LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 19 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1256

ROBERT DULAINE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ANSWER TO DEFENDANT'S MEMORANDUM

ROBERT DULAINE,
2019 No. Berendo St.
Los Angeles, California 90027
NO 6-0685
Propria Persona.

WESTERN PRINTING COMPANY, WHITTIER—OREGON 9-1782

TOPICAL INDEX

Page

Defendant Admits There is Administrative Claim Provision 1

Defendant Does Not Deny Administrative Claim For Malpractice Was Filed March 6, 1957 2

"Statement of the Case" on Administrative Claim Was Raised and Ignored by Court Below 3

Letters to V.A. Explaining Malpractice and Requesting Payment Act As Bar to Statute of Limitations 3

If Payment is Made Under Tort Claims Act — It Will Be Deducted From Future Compensation Award 4

$2,500 Limit May Be Increased For Newly Discovered Evidence 5

Increased Disability Proved and Admitted By V.A. in 1963 and 1964 8

If Claim Not Forwarded to Proper Section for Payment — Claimant Still Has 6 Months After Final Determination Before Statute of Limitations Could Apply 8

10 Years Have Passed Without Final Determination on Malpractice Claim 9

TABLE OF CASES AND AUTHORITIES CITED

Authorities

	Page
Code of Federal Regulations, Item 2, Special Benefits	4
28 U.S.C. 1346(b)	4
28 U.S.C. 2672 or 2677	4
28 U.S.C. 2675(a)	8
28 U.S.C. 2675(b)	7
38 U.S.C. 351	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1256

ROBERT DULAINE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY TO DEFENDANT'S MEMORANDUM

DEFENDANT ADMITS THERE IS ADMINISTRATIVE CLAIM PROVISION.

Defendant's attorney admits in the MEMORANDUM FOR THE UNITED STATES IN OPPOSITION . . . at the bottom of page 2 . . . "If a claim not exceeding $2,500 has been presented in writing to the appropriate Federal Agency within that period of

time (two years after such claim accrues), suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim."

DEFENDANT DOES NOT DENY ADMINISTRATIVE CLAIM FOR MALPRACTICE WAS FILED MARCH 6, 1957.

Attorney for the defendant does not deny that Petitioner's "administrative claim filed on March 6, 1957 with the Los Angeles Veterans Administration Regional Office" was in fact a malpractice claim for payment . . . in Writing, to the appropriate Federal Agency, and well within two years after accrual . . . and not exceeding $2,500. This proves that the summary judgment that was granted to the defendant by applying the statute of limitations was granted in error. As to the statement that this contention was neither raised nor considered below . . .

"STATEMENT OF THE CASE" ON ADMINISTRATIVE CLAIM WAS RAISED AND IGNORED BY COURT BELOW.

On page 7 of Appellant's Brief it is stated . . .

> "The 'Statement of the Case' of September 29, 1964, on page 13 in the second paragraph lists the reasons for the decision not to award payment for malpractice. There is no mention of Statute of Limitations. If the Statute of Limitations has expired in this case, it would have to be listed in the Statement of the Case. It was not listed and therefore, it does not apply."

. . . This was also listed in the "Affidavit of Robert Dulaine in opposition to motion for summary judgment. (Tr. p. 31, 32.)

LETTERS TO V.A. EXPLAINING MALPRACTICE AND REQUESTING PAYMENT ACT AS BAR TO STATUTE OF LIMITATIONS.

In addition, as explained in the Petition for Writ of Certiorari . . . all of the letters sent to the Veterans Administration and listed as admissions were requests for payment . . . in writing . . . to the Federal Agency involved and all of them were sent well within two years of the discovery of the additional acts of negligence. The Veterans Administration is instructed to immediately send proper forms to any Veteran who mentions that he has been injured in a V.A. Hospital. If the V.A. fails to send the proper forms to the in-

jured Veteran . . .then the original letter will act as a claim. In several of my letters I stated that there must be some form of lump sum payment for a Veteran who had been severely wounded before the damage during hospitalization had occurred. The only lump sum payment would be under the Tort Claims Act . . . however, my request was illegally ignored and the proper forms were never sent . . . This means that my original letters that are in the Regional office file will fulfill the requirement of a written claim.

IF PAYMENT IS MADE UNDER TORT CLAIMS ACT —IT WILL BE DEDUCTED FROM FUTURE COMPENSATION AWARD.

In addition, under the Code of Federal Regulations dated January 1, 1966 on page 135 under item 2 of Special Benefits . . . it is stated . . .

> Where any person is awarded a judgment on or after December 1, 1962, against the United States in a civil action brough pursuant to 28 U.S.C. 1346(b), or enters into a settlement or compromise on or after December 1, 1962 under 28 U.S.C. 2672 or 2677, by reason of a disability, aggravation or death within the purview of this section, no compensation or dependency and indemnity compensation shall be paid to such person for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the total amount of benefits which would be paid except

for this provision equals the total amount included in such judgment, settlement, or compromise. (38 U.S.C. 351; sec. 3, Public Law 87-825)

This proves that my administrative claim that is still pending acts as a bar to the Statute of Limitations. If I win the suit then the amount would be deducted from any compensation that I might be awarded in my administrative claim. In addition, to point out the connection between the two claims . . . If the Veterans Administration Rating Board would grant a 100% rating to a Veteran injured in a government hospital . . . and the Veteran filed suit under the Tort Claims Act . . . it has been established that he could not recover and the suit would be set aside.

$2,500 LIMIT MAY BE INCREASED FOR NEWLY DISCOVERED EVIDENCE.

At the bottom of page 2 of the Defendant's Memorandum it is stated that "Tolling" of the Statute of Limitations is for cases "not exceeding $2,500."

I explained this on page 19 of the Petition. There was a $2,500 limit on the original claim . . . but due to the concealment of the facts of the operation . . . The tremendous internal damage that was caused by the through and through high-velocity bullet wound of the abdomen that was overlooked in rating for compensation and treatment by the Veterans Administration . . . after my discharge from the U.S. Marine

Corps . . . and not admitted until 1963 when service-connection was first granted for perforating gunshot wound of the abdomen . . . and the numerous pieces of metal in the path of the bullet through the body that show the explosive effect of the missile and prove severe damage to the internal organs . . . that also were overlooked until 1963 when I insisted on complete x-rays to prove the effects of the combat wounds. In addition, the discovery of the two traumatic arteriovenous aneurysms in 1964 . . . the ligation of the external iliac vein, the ligation of the hypogastric vein, the ligation of the large gluteal branch of the iliac vein which were concealed from me and the adjudication office of the Veterans Administration . . . until Nov. 27, 1962 when my records were released by Sawtelle (Wadsworth) Veterans Hospital . . . all was newly discovered evidence not reasonably discoverable at the time of presenting the claim to the Veterans Administration. Also, the discovery of the fact that the operation for A-V fistula was *Non-Curative* as stated in the medical examination of Aug. 23, 1960 by Dr. Pava and Dr. Coons of the Veterans Administration outpatient clinic that was concealed from me and the Board of Veterans Appeals until 1963. Additional evidence was discovered in 1964 when Mr. Farmer of the Pension and Compensation Service of the Veterans Administration sent me the V.A. Schedule for Rating Disabilities. I was not permitted to see the Schedule for Rating Disabilities until it was made a public docu-

ment by Congress so that veterans could better understand their disabilities and compensation ratings . . . It was first released in 1964. To point out a few of the obvious errors in my rating. A traumatic arteriovenous aneurysm has a minimum rating of 50%. I was never rated for an aneurysm until 1964 and then the rating board stated that I had no vascular problems previous to 1962. I have proved that I had two traumatic arteriovenous aneurysms from the date of my discharge from the U.S. Marine Corps on Feb. 15, 1946. Dr. Taylor of the Veterans Administration Medical staff at Sawtelle Hospital recorded there were two "fistulas" (The correct name is aneurysm, traumatic arteriovenous) This means I should be rated for each aneurysm and in addition this combined rating would be increased by 10% because of the bilateral factor. My complete claim is on file with the Board of Veterans Appeals, Washington, D.C. so I will not take up the court's time to list all of the discrepancies here . . . however, if the court wishes . . . I will submit copies of my complete claim for disability compensation and my complete claim for malpractice that is now on appeal in Washington. Now, the above listed additional disability, the omissions of fact and the concealment of the malpractice and the tremendous internal damage has increased the claim to $100,000. This is permitted and explained in 28 U.S.C. 2675(b). "An increased amount is not allowed . . . *EXCEPT* WHERE THE INCREASED AMOUNT IS BASED UPON NEWLY

DISCOVERED EVIDENCE NOT REASONABLY DISCOVERABLE AT THE TIME OF PRESENTING THE CLAIM TO THE FEDERAL AGENCY.

INCREASED DISABILITY PROVED AND ADMITTED BY V.A. IN 1963 AND 1964.

(For proof of newly discivered evidence of tremendous internal damage see P.V. examination dated Nov. 26, 1963. (Tr. p. 30, 31.) Also, see X-ray report of June 12, 1963 (Tr. p. 29)) I have been on pain pills constantly for the last three years because of the problems with both legs brought on by the operation. I have constant chest pains as a result of the pulmonary embolism and infarction that was brought on by the malpractice . . . but I have never been paid any compensation for this.

IF CLAIM NOT FORWARDED TO PROPER SECTION FOR PAYMENT — CLAIMANT STILL HAS 6 MONTHS AFTER FINAL DETERMINATION BEFORE STATUTE OF LIMITATIONS COULD APPLY.

In conclusion I would like to quote from page 9 of the Petition . . . (28 U.S.C. 2675 (a) . . . "IF THE AGENCY FAILS TO FORWARD THE CLAIM TO THE PROPER SECTION FOR PAYMENT OF THE CLAIM . . . THIS WILL HAVE NO EFFECT ON THE BAR TO THE STATUTE OF LIMITATIONS." THE CLAIMANT STILL HAS UNTIL SIX MONTHS AFTER FINAL DETERMINA-

TION OF THE CLAIM . . . BEFORE THE STATUTE OF LIMITATIONS COULD APPLY."

The Administrative Claim that was filed on March 6, 1957 acted as a bar to the Statute of Limitations and therefore the Summary Judgment that was granted to defendant was awarded in error.

10 YEARS HAVE PASSED WITHOUT FINAL DETERMINATION ON MALPRACTICE CLAIM.

It is respectfully requested that the United States Supreme Court grant the request for WRIT OF CERTIORARI to review the above case in its entirety . . . and due to the fact that ten years have passed without a decision on the original malpractice claim . . . if it is possible . . . make an award for malpractice, the omissions of fact, the negligent lack of treatment and the obvious concealment in the case . . . and thereby prevent a gross miscarriage of justice.

ROBERT DULAINE,
Petitioner.